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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 702

SAM McINTYRE,

Petitioner,

vs.

STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

Petition.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Sam McIntyre, respectfully shows:

That on the 23rd day of February, 1940, an indictment was returned against him by the Grand Jury of Fulton County, Georgia, charging and accusing him with the offense of misdemeanor: "for that said accused, in the County of Fulton and State of Georgia, on the 17th day of February 1940 with force and arms did keep, maintain and operate a lottery, known as the number game, for the hazarding of money, contrary to the laws of said State, the good order,

peace and dignity thereof," which said indictment was transferred to the Criminal Court of Fulton County for trial without notice to petitioner.

That on the 22nd day of March, 1940, the cause entitled *State of Georgia* v. *Sam McIntyre* came on to be tried in the Criminal Court of Fulton County.

That upon the call of the case, and before arraignment and pleading to said cause, in the Criminal Court of Fulton County petitioner filed a Special Plea setting out in detail facts which discriminate against him arbitrarily and unjustly, and deny petitioner due process of law and equal protection under the 14th Amendment to the Constitution of the United States and attacking the validity of the statutes which provide for trials of misdemeanors by said court. The Special Pleas was overruled by said court, and petitioner ordered to proceed to trial in the Criminal Court of Fulton County.

The certain evidence introduced upon the trial of the petitioner was objected to and a proper and timely motion to exclude and rule out from the consideration of the jury said evidence on the ground that it was obtained by an unreasonable, illegal and unauthorized search and seizure in contravention and violation of certain provisions of the Constitution of the State of Georgia, hereinafter set out thus violating certain provisions of the Constitution of the United States hereinafter set out. Said objections were overruled by the trial court, and the evidence admitted. Petitioner was found guilty of the offense charged, and sentenced to serve twelve (12) months on the public works.

On the 20th day of April, 1940, a timely appropriate petition for the writ of certiorari was presented to Fulton Superior Court, in accordance with the rules of practice and procedure in such cases, and on the same day an order refusing to sanction said petition and denying petitioner's appeal was entered by said Fulton Superior Court. To

this order petitioner then and there duly and properly excepted and assigned the same as error. Within the time prescribed by law, a certified Bill of Exceptions was presented to the Supreme Court of Georgia in which the nature of said cause and the errors complained of were plainly, fully and distinctly set out, to which was attached all material necessary to a clear understanding of the cause, together with the Petition for Writ of Certiorari and the Order refusing to sanction the same.

After argument, the Supreme Court of Georgia on September 24th, 1940, affirmed the Order refusing to sanction petitioner's Writ of Certiorari, and in so doing, passed upon the constitutional questions raised by the petitioner in the original court (— Ga. —).

A Motion for Rehearing was filed by petitioner within the time prescribed by law and said Motion was denied on October 16th 1940.

The Supreme Court of Georgia has thus established law in the State of Georgia which has deprived petitioner of rights and privileges guaranteed him under the Constitution of the State of Georgia and under the Constitution of the United States, as will be more fully hereinafter set out.

Part I.

Petitioner has been denied by the State of Georgia equal protection and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that he has been arbitrarily and unjustly discriminated against in the following manner, to-wit:

1. The indictment against petitioner was transferred to the Criminal Court of Fulton County without the knowledge or consent of petitioner, and at petitioner's first opportunity, objection was made by a written plea in abatement (R. 2), which was overruled and denied by the trial court (R. 13).

2. Petitioner, over his timely objection, and as a result of the capricious whim of the officials of the courts, was tried in the Criminal Court of Fulton County, while others similarly situated and in like circumstances are provided trial in Fulton Superior Court; the said trial of petitioner is an arbitrary and unjust discrimination between him and others similarly situated and is a denial of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States for that:

(a) The Criminal Court of Fulton County, created by statutes, the validity of which is herein challenged, has concurrent jurisdiction with Fulton Superior Court in the trial of misdemeanors, but trials in said Criminal Court are discriminatory against petitioner as will hereinafter appear:

(b) Trials in said Superior Court are had before a jury of twelve (12) selected from a panel of twenty-four (24) tales jurors, from which the accused has seven (7) peremptory strikes and the State five (5); whereas in the Criminal Court trials are had before a jury of five (5) selected from a panel of twelve (12) tales jurors, from which the accused has four (4) peremptory strikes and the State three (3);

(c) The unanimous verdict of twelve (12) jurors is required for conviction in the said Superior Court, while the unanimous verdict of only five (5) jurors is required for conviction in the said Criminal Court of Fulton County;

(d) In the event of conviction in the said Superior Court a new trial may be obtained on newly discovered evidence, whereas in the said Criminal Court one is precluded by law from seeking or obtaining a new trial upon that ground;

(e) The right to a Motion for Change of Venue to obtain an impartial jury is provided in the said Superior Court,

whereas such right is denied in the said Criminal Court, by law.

(f) Appeal from conviction in the said Superior Court is directly by Bill of Exceptions to the proper Appellate Court, whereas in the said Criminal Court the more involved and expensive method of appeal is by writ of certiorari through the Superior Court and thence to the appellate Court;

(g) Selection of the court in which one accused is tried, *i. e.,* Criminal Court of Fulton County or Fulton Superior Court, is left entirely to the capricious whim of the officials of the courts;

(h) Even if the statutes hereinafter challenged were valid, which petitioner denies, the protection therein provided has been denied to petitioner inasmuch as the provision for transfer to said Criminal Court from said Superior Court states in part: "* * * that whenever a prosecution may be commenced in the Superior Court of Fulton County * * *, the same may be transferred to and tried in the City Court of Atlanta (now Criminal Court of Fulton County) *at the discretion of the presiding Judge of said Superior Court,* * * *." The prosecution in the instant cause was not transferred "at the discretion of the presiding Judge of said Superior Court," but was transferred at the capricious whim of the Solicitor General.

(i) Section 15 of the Act of September 6, 1891 (Acts 1891, pp. 935, *et seq.* Vol. II) conferring jurisdiction upon the Criminal Court of Atlanta (Act of Feb. 23, 1935, changed name to Criminal Court of Fulton County) to try misdemeanors, which adopted the provisions of the Act of 1871 (Acts 1871, p. 57) and the Act of 1876 (Acts 1876, p. 96), which gave jurisdiction to the City Court of Atlanta to try misdemeanors in Fulton County, amended by Sec-

tion 1 of said Act of February 23, 1935, providing that said court should have jurisdiction over the County of Fulton of the following matters, viz., "all crimies and offenses which by the Constitution of the State are not exclusively cognizable in the Superior Courts thereof, insofar as the same relates to misdemeanors alleged to have been committed in Fulton County," is unconstitutional and void, being repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States for that it discriminates between petitioner and others in like circumstances and similarly situated.

(j) That portion of Section 11 of said Act of 1891 (Vol. II, Acts 1890-91, p. 397) which provided that "the jury in said Court shall consist of five (5), to be stricken alternatively by the defendant shall be entitled to four (4) strikes and the State three (3), and the remaining five (5) jurors shall compose the jury," is unconstitutional and void, being repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States for that it discriminates between petitioner and others in like circumstances and similarly situated.

(k) Section 16 of said Act of 1891, creating the Criminal Court of Atlanta, which adopted the provisions of Section 1 of the Act of February 21, 1873 (Acts 1873, p. 119) providing "that whenever a prosecution may be commenced in the Superior Court of Fulton County against any person or persons charged with the commission of an offense in the City of Atlanta, not punishable by death or imprisonment in the penitentiary, the same may be tried in said City Court upon indictment found in said Superior Court, and the Clerk of said Superior Court shall transfer all papers in the cause to the said City Court" is unconstitutional and void, being repugnant to and violative of the Fourteenth Amendment to the Constitution of the United

States for that it discriminates between petitioner and others in like circumstances and similarly situated.

2. The question of unjust and arbitrary discrimination between petitioner and others similarly situated, as hereinbefore set out, was properly raised in the trial court (R. 2), and the question was again properly presented in the petition of certiorari to Superior Court (R. 2), and was properly presented to, and was passed upon by the Supreme Court of Georgia (R. 24). It is now properly before this Honorable Court.

3. The validity of the statutes hereinbefore referred to was drawn in question and was presented to the trial court in the written plea in abatement (R. 3), the exception preserved and presented on certiorari to the Superior Court (R. 1), and by that court passed upon (R. 23), and thereafter properly preserved, and presented to and subsequently passed upon by the Supreme Court of Georgia (R. 24), and now is properly before this Honorable Court for final determination.

Part II.

Petitioner has been and is being deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States for that:

1. The sole evidence adduced upon the trial of petitioner was obtained by an unreasonable search and seizure, without a warrant, and while petitioner was neither under legal arrest nor violating any law in the presence of the searching officers, albeit Article 1, Section 1, Paragraph XVI of the Constitution of the State of Georgia provided:

> "The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable search and seizures, shall not be violated; and no

warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

2. Timely objection was made in the trial court to the introduction and admission of the evidence obtained by said unreasonable search and seizure, which said objection was overruled (R. 17). Said evidence objection being as follows:

"At the time I saw McIntyre he was talking to Smith. I did not have a warrant for his arrest. He was not committing any crime in my presence. We did not have a search warrant for him, but we held him and searched him and found that book but don't remember which pocket it was in * * *. He objected to our searching him * * *. From my knowledge of the lottery I would say that those things in that book which would indicate it was used in the lottery operation."

"We object to the introduction of these articles in evidence and to the testimony based thereon on the ground that they were taken from the person of this defendant forcibly and against his will in violation of the Constitution of Georgia, Article 1, section 1, paragraph 16, to-wit, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

We object further on the ground that this evidence was obtained in violation of the constitution of Georgia as contained in article 1, section 1, paragraph 6, to-wit: "No person shall be compelled to give testimony tending in any manner to criminate himself."

In that this defendant was compelled to submit while his person was searched, in violation of the provisions

of this section of the constitution and as a result of this evidence being so forcibly obtained in violation of the constitution of Georgia, defendant is without adequate and complete remedy of law unless this evidence is stricken from the record and not admitted for the consideration of the jury, and that the admission in evidence of these documents obtained in violation of the State constitutional guarantees, denies this defendant due process of law and the equal protection of the 14th amendment to the constitution of the United States, in that this defendant is by the Constitution of Georgia guaranteed these rights under said constitution, but if this evidence is admitted he is without means of securing the benefits of these constitutional guarantees, the effect of which is to deny him due process of law under the 14th amendment to the constitution of the United States, and on the further ground that the defendant's rights under these constitutional provisions were denied him by two or more officers of the State of Georgia, acting in concert violation of the civil right act of the United States as contained in title 8, section 47, sub-paragraph B, of the United States Code Ann."

Which said objection the court overruled and permitted the documentary evidence to be introduced, and the oral testimony to remain for the consideration of the jury.

3. Admission of the evidence obtained by said unreasonable, unconstitutional, illegal and unauthorized search and seizure and the testimony pertaining thereto, being highly prejudicial, and admitted over the timely objections of petitioner, has deprived petitioner of the benefits, rights and privileges guaranteed by Article 1, Section 1, Paragraph III, of the Constitution of the State of Georgia to-wit: "No person shall be deprived of life, liberty or property, except by due process of law." The effect of which is to deprive him of his liberty without due process of law

in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The admission of evidence obtained by said unreasonable search and seizure has compelled petitioner to give testimony which tends to criminate him, albeit Article 1, Section 1, Paragraph VI of the Constitution of the State of Georgia provided:

> "No person shall be compelled to give testimony tending in any manner to criminate himself."

5. Deprivation of the rights and privileges guaranteed to petitioner by the Constitution of the State of Georgia is a denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

6. All of the objections based on said constitutional grounds were properly made to the introduction and admission of said evidence in the trial court, and said objections were overruled, and exception was properly preserved and presented to the Superior Court in the petition for certiorari (R. 16), and thereafter presented to and passed upon by the Supreme Court of Georgia (R. 24), and it is properly before this Honorable Court for final determination.

Two substantial Federal questions are presented in this Petition and they are before this Court for review.

WHEREFORE, petitioner prays that an Order granting this Petition for Writ of Certiorari be entered, notifying the Supreme Court of Georgia of the granting of the petition, and that the certified transcript of all proceedings of the said Supreme Court in the cause entitled Sam McIntyre *v.* State of Georgia, No. 13399 transmitted herewith be treated as though sent up in response to a formal Writ, to the end that the said cause may be reviewed and deter-

mined by this Court as provided in 28 U. S. C. 344 (b); that said judgment of the Supreme Court of Georgia in said case may be reversed by this Court, and that petitioner may have such other and further relief or remedy in the premises as this Honorable Court may deem appropriate.

Respectfully submitted,

SAM MCINTYRE,

By GEORGE G. FINCH, G. SEALS AIKEN,

His Attorneys.

BRIEF OF AUTHORITIES ON BEHALF OF PETITIONER.

There are two fundamental questions which this petition raises.

I.

The Supreme Court of Georgia has held in effect that in the trial of one accused of a misdemeanor there is no discrimination against him if he is tried before a jury of five (5) selected from a panel of twelve (12) tales jurors, from which the accused has four (4) peremptory strikes and the State three (3), while another, accused of the same misdemeanor, is tried before a jury of twelve (12) selected from a panel of twenty-four (24) tales jurors, from which the accused has seven (7) peremptory strikes and the State five (5), an unanimous verdict being required in both cases.

The Court likewise held in effect that there was no discrimination against petitioner even though he was denied the right to seek a new trial on grounds of newly discovered evidence, while another accused of the same misdemeanor might have that right.

The Court held in effect that there was no discrimination against petitioner though he was denied the right to seek a change of venue, while another accused of the same misdemeanor might avail himself of that right.

The Court held in effect that there was no discrimination against petitioner though a burden of an involved and expensive method of appeal to have his rights finally determined was placed upon him from which another accused of the same misdemeanor might be relieved.

The Court held in effect that there was no discrimination against petitioner though the law was not complied with in the selection of the Court in which he was tried, the

petitioner had no choice in the matter of selecting the Court, and said selection was left to the capricious whim of the Solicitor General who, under the law, has no right to select such court.

How can it be said that there is not discrimination between petitioner and another accused of the same offense, living in the same County, when petitioner is arbitrarily denied the rights given another, as above set out?

The Supreme Court of Georgia reached its decision without applying its own definition of "due process of law." In *Lamar* v. *Prosser,* 121 Ga. 153, at 154, the Court said:

> " 'Due process of law,' as required by the fourteenth amendment to the constitution of the United States, means only that a man is to be tried, as every other man is tried. * * *"
>
> "Due process of law is secured by laws operating on all alike, without discrimination. Caldwell *v.* Texas, 141 U. S. 211."

With respect to the definition of "equal protection of the law," the court in *Baugh* v. *City of LaGrange,* 161 Ga. 80, at 81, said:

> "It is only in cases where laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied."

It is respectfully submitted that had the court applied its own definitions of these two phrases to the instant cause, it could not have arrived at the decision here complained of.

It is conceded by petitioner that a State may regulate the practice and procedure in its courts, even to the extent of dispensing with a jury trial (*Hurtado* v. *California,* 110 U. S. 516), but unless those regulations are applied in a like manner on all persons in like circumstances or simi-

larly situated, then they become discriminatory and amount to a denial of equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In *Maxwell* v. *Dow*, 176 U. S. 581, at page 604, this Honorable Court through Mr. Justice Peckham said:

> "It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, *so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them.*" (Emphasis added.)

See also:

> *Caldwell* v. *Texas*, 137 U. S. 692;
> *Leeper* v. *Texas*, 139 U. S. 462.

In the *Caldwell* case it was held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution of the United States, and that due process of law, within the meaning of the Constitution, is secured *when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.*

It is respectfully submitted that in the instant case the laws complained of do not operate on all alike, and petitioner has been subjected to partial and arbitrary exercise of the powers of government.

In view of the foregoing, it can hardly be said that a substantial Federal question has not been presented.

II.

The second question presented for review is whether or not the denial of certain privileges and immunities guaranteed by the Constitution of the State of Georgia is likewise a denial of certain privileges and immunities guaranteed by the Constitution of the United States, so as to present a substantial Federal question for determination by this Honorable Court.

Obviously, the Supreme Court of Georgia misconstrued petitioner's assignment of error with respect to the introduction and admission of certain evidence illegally obtained. This assignment was not based on the Fourth and Fifth Amendments to the Constitution of the United States, nor was it based on the application of the "due process" clause of the Fourteenth Amendment to the Fourth and Fifth Amendments. Rather, it was based solely on a violation of the Fourteenth Amendment to the Constitution of the United States by depriving petitioner of the rights and privileges guaranteed him by the Constitution of the State of Georgia and laws enacted in pursuance thereof.

To justify the jurisdiction of this Honorable Court, petitioner must have been deprived of fundamental rights, the observance of which is indispensable to the liberty of the citizen. (*Allen* v. *Georgia*, 166 U. S. at 141.)

Article I, Section 1, Paragraph III of the Constitution of the State of Georgia, provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

Article I, Section 1, Paragraph VI of said Constitution provides:

> "No person shall be compelled to give testimony tending in any manner to criminate himself."

Article I, Section 1, Paragraph XVI of said Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized."

Petitioner has been and is being denied the rights and privileges guaranteed by the foregoing provisions of the Constitution of the State of Georgia, and in being so denied, can it be doubted that he is likewise being denied the guarantee of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

The words "due process of law" refer to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. (*Ex parte Kemmler,* 136 U. S. 436.) The words are intended to give increased security against arbitrary deprivation of life or liberty. (*Hurtado* v. *California,* 110 U. S. 535.)

While it is true that this Court has held that "the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by this clause of the 14th amendment against abridgment by the States" (*Twining* v. *New Jersey,* 211 U. S. 78), when the exemption is guaranteed by the Constitution of the State of which petitioner is resident, it can hardly be said that the denial of the guarantee is not a denial of due process.

Under the test as laid down in *Palko* v. *Connecticut,* 302 U. S. 319, as to whether a right comes within the purview of the 14th Amendment, it must be of "the very essence of

a scheme of ordered liberty" * * * or a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." It is submitted that the denial of the constitutional guarantee of the Constitution of the State of Georgia with respect to the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, is a violation of a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental, thus bringing it within the purview of the Fourteenth Amendment.

That use by a State of improperly obtained evidence may constitute a denial of due process of law was upheld recently by this Court in *Chambers* v. *Florida,* 84 L. Ed. 419, citing *Brown* v. *Mississippi,* 297 U. S. 278.

A substantial Federal question has thus been raised.

Respectfully submitted,

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STATE OF GEORGIA.

Brief of State of Georgia, Respondent, in Opposition To Grant of Writ of Certiorari to Supreme Court of Georgia

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In the Supreme Court of the United States

OCTOBER TERM, 1940

NO. 702

SAM McINTYRE,
PETITIONER,

v.

STATE OF GEORGIA.

Brief of State of Georgia, Respondent, in Opposition To Grant of Writ of Certiorari to Supreme Court of Georgia

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PART ONE

STATEMENT OF CASE

The grand jury of Fulton County, Georgia, in a special presentment returned into the superior court of that county, indicted McIntyre for the offence of maintaining a lottery, a misdemeanor under the laws of Georgia. (R. 20). The indictment was transferred for trial to the criminal court of Fulton County. In that court McIntyre filed a plea in abatement attacking the Act creating the court as violative of the Fourteenth Amendment, and challenging the transfer of the indictment on that ground because of procedural differences between the superior court and the criminal court. (R. 2-7). This plea was overruled.

On the trial the State was permitted to introduce into evidence, over objection that it was violative of the Fourteenth Amendment, a pistol, a bag containing $664.00 in money, and alleged lottery records (R. 15 at (f)-17), which had been taken from the person of the accused and an automobile in which he was sitting at the time of his arrest, by police officers who did not have a warrant so to do. (R. 9, cross-examination of Burton Carroll; R. 11, Testimony of C. E. Mitchell). Over a like objection, the court refused to exclude testimony as to the manner of operation of the lottery and explanatory of the alleged lottery records. (R. 17, at bottom of page, -19).

After verdict of guilty, petition for writ of certiorari to the criminal court of Fulton county, assigning error on the rulings aforesaid, was presented to the superior court, which refused sanction and the supreme court of the State affirmed and refused a rehearing, in an opinion which has not been officially published but appears at R. 24-33.

Certain inadvertancies in petition for writ of certiorari to supreme court of Georgia: (1) It is stated in Part 1, Par. 1 (Petition, p. 3): "1. The indictment against petitioner was transferred to the criminal court of Fulton county without the knowledge or consent of petitioner, and at petitioner's first opportunity, objection was made by a written plea in abatement . . .". This is not the claim made in the plea in abatement, Par. 4 (R. 3) of which is as follows: "4. Defendant shows that said case has now been transferred to the criminal court of Fulton county without petitioner's consent." There is nothing in the record to support a statement that the transfer was without knowledge, or opportunity to object;—so far as the record shows petitioner may have in fact unsuccessfully objected. (2) In Part I, Par. 2 (Petition, p. 4), it is alleged: "Petitioner . . . . as a result of the capricious whim of the officials of the courts, was tried in the criminal court of

Fulton county . . . . . ". There is nothing in the record to indicate that the transfer was the result of whim or caprice. The order of transfer is not brought up. There is nothing to suggest that the transfer was not pursuant to the statute authorizing transfer by the judge of the superior court in his discretion. (Act approved Feb. 21st, 1873, sec. I, Ga. Laws 1873, p. 119; Act, approved Sept. 6, 1891, sec. XVI, Ga. Laws 1890-91, Vol. 2, p. 935, on p. 939). (3) In Part I, Par. 2 (g) (Petition, p. 5), the statement "Selection of the court in which accused is tried, i. e., criminal court of Fulton County or Fulton Superior Court, is left entirely to the capricious whim of the officials of the courts;" falls in the category above. (4) In Part I, Par. (h) (Petition, p. 5), the allegation "The prosecution in the instant cause was not transferred 'at the discretion of the presiding judge of said superior court,' but was transferred at the capricious whim of the solicitor general," is likewise unsupported by the record. (5) In Part I, Par. (k) (Petition, p. 6), the quotation from the Act of 1873 omits the provision of that act that transfer be "at the discretion of the presiding judge of said superior court." These omitted words are set out in Par. (h) of Part I (Petition, p. 5).

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

Summary

A. The Criminal Court

Petitioner's attack upon the statutes creating the criminal court of Fulton county as denying the equal protection of the laws because persons tried in that court are tried before a jury

of five, may not move for change of venue in that court, and may not appeal for new trial after conviction because of newly-discovered evidence, while persons tried in the superior court of the county are tried before a jury of twelve and may raise questions of venue and newly-discovered evidence, is without merit.

The superior court is a court of general jurisdiction over all classes of cases, civil and criminal. The criminal court is a misdemeanor court for the trial of petty offenses only, with procedure adapted to its limited jurisdiction. The State had the right to create both courts and regulate the procedure in each. Differences in procedure are mere incidents to the exercise of this undoubted power. That both courts have jurisdiction over the same territory in misdemeanor cases, does not change the rule, for while territory may serve as a convenient means of classification, it is not the only basis for classification. All persons charged with misdemeanors in the county are subject to trial in either the superior or criminal courts. All persons tried in the superior court are tried alike, and all persons tried in the criminal court are tried alike. There is no discrimination.

The State is not required to confer on a mere misdemeanor court power to grant changes of venue and new trials for alleged newly-discovered evidence. These powers were wisely withheld from the criminal court and wisely conferred on the superior court whose trials involve important matters of property and questions of life, death, and long terms of imprisonment. Petitioner shows no right to complain of the absence of these powers in the criminal court since he shows no resulting prejudice or injury.

Petitioner's contention that differing methods of appeal from the two courts require one convicted in the criminal

court to resort to a procedure more expensive and involved, if true, shows no inequality since the difference in methods of appeal arises out of power to create the two courts and regulate their respective procedures, all persons appealing from both courts being required to conform to the law applicable to the court appealed from.

Equal protection of the laws was not denied petitioner because the indictment against him was returned in the superior court and transferred into the criminal court for trial. The contention that the transfer was not at the discretion of the presiding judge of the superior court, as required by law, but at the whim and caprice of the solicitor-general, is not supported by the record. The right to provide for transfer of cases into the criminal court for trial at the discretion of the presiding judge is a lesser right of the State contained in the greater right to create courts and endow them with jurisdiction.

B. The Evidence

Due process was not denied by the admission over objection of incriminating articles taken from petitioner's person and automobile by State officers without a search warrant. This was in accord with the law of the State as pronounced in many decisions of its supreme court and followed over a long course of years. This was likewise in keeping with the general rule upon the subject, that evidence, if relevant to the issue of guilt, will not be repelled because wrongly and illegally obtained by officers of the State who may be civilly and criminally liable therefor.

This was the common law, is the rule stated by law writers, approved by this court in *Adams v. New York*, and is the law in forty States of the American Union. Adherence to this settled principle is not denial of due process of law. The primary result of departure therefrom is to set the guilty free.

Argument

Acts creating criminal court of Fulton county do not offend Fourteenth Amendment for inequality

Nature of Criminal court of Fulton county. In 1871 the General Assembly of Georgia created the city court of Atlanta, with jurisdiction over the territorial limits of that city in certain civil cases and criminal cases of misdemeanor. Criminal cases were to be tried on written accusations founded upon affidavits, and a jury of five was provided for when demanded. (Ga. Laws 1871-72, p. 57). Thereafter the territorial jurisdiction of this court was increased so as to embrace all Fulton county. (Ga. Laws 1875, p. 40, sec. I). By a later Act (Ga. Laws 1890-91, Vol. II, p. 935), the criminal jurisdiction of this court was vested in the criminal court of Atlanta created by that Act, Sec. 16 of which made applicable to the criminal court existing city court law relative to transfer from the superior court of misdemeanor cases. Such transfer had been provided for in an Act approved Feb. 21, 1873, (Ga. Laws 1873, p. 119, sec. I), "at the discretion of the presiding judge of said superior court." By rule of court 10 (b) the superior court provided "When misdemeanor indictments have been returned by the grand jury it shall be the duty of the clerk to present the same to the directing judge for transfer to the misdemeanor court, after the expiration of five days from the return of the indictments into court, unless the court or written application of the solicitor general or counsel for the defendant shall by written order direct that the same be retained in this court for trial." (Rules of Fulton Superior Court adopted June 27th, 1936, p. 34.) In 1935 the name of the court was changed to criminal court of Fulton County. (Ga. Laws 1935, p. 498).

As in Georgia the superior court is a court of general jurisdiction over all classes of cases (Constitution of 1877, Ar-

ticle VI, Sec. IV, Pars. I-V, Code of 1933, Sec. 3-201 thru 3-205; Code of 1933, Sec. 24-2615; compare Constitution of 1868, Article V, Sec. III, Par. II, Code of 1873, Sec. 5090; Porter vs. State, 53 Ga. 236), there are in Fulton county two courts with concurrent jurisdiction in misdemeanors. This is not an unusual situation. It exists in all the large cities of the State, and in many of the smaller communities. The General Assembly have from time to time been constrained to create additional courts for the more expeditious handling of business; and particularly has this been true with respect to the trial and disposition of misdemeanor cases, which in the cities tended to clog the dockets of the superior courts. In the creation of these courts no general plan has been adhered to so that procedure would be identical in all, but rules and laws have been set up in connection with each court according as it seemed best to the Legislature.

No inequality merely because there are two courts in the county with concurrent jurisdiction. Petitioner contends the Acts creating court of Fulton county offend the Fourteenth Amendment because of differences in procedure in that court and the superior court; that by reason of these differences discrimination and denial of equal protection of the laws arise. Manifestly, when two courts have concurrent jurisdiction, some variance necessarily exists, so that a litigant in one court does not undergo precisely the same trial as in the other. For example, the judges of the two courts are not the same persons; one judge might render a correct decision and another an erroneous one; the prosecuting officers of the two courts are not the same; and the jurors therein would be different. But no one would contend that these differences in the manner in which the law was applied to similar cases would constitute a denial of the equal protection of the laws. "The guaranty of the Fourteenth Amentment of the equal protection of the laws is not a guaranty of equality of opera-

tion or application of State legislation upon all citizens of a State." *Stebbins* & H*urley vs. Riley*, 268 U. S. 137; 69 L. ed. 884, 888. The equality clause " . . . . is not a substitute for Municipal law . . . ." *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. St. Rep. 594.

"A State is free since the adoption of the Fourteenth Amendment, as it was before, not only to determine what system of law shall prevail in it, but, also, by what processes legal rights may be asserted, and in what courts they may be enforced." Per Brandeis, J., *Truax vs. Corrigan*, 257 U. S. 312, 373, 66 L. ed. 254, 282.

The Jury: In the superior court for misdemeanors a jury of twelve is selected from a panel of twenty-four, the accused having seven and the State five peremptory challenges. In the criminal court a jury of five is selected from a panel of twelve, the accused having four and the State three peremptory challenges.

A jury of five is not infrequent in Georgia. Justice courts, established by the Constitution of the State (Code of Georgia, 1933, Sec. 2-3501), try civil cases involving under an hundred dollars with a jury of five. (Code of Ga. 1933, Sec. 6-403). The civil court of Fulton county tries cases involving twenty-five hundred dollars with a jury of five. (Ga. Laws 1913, p. 145). The Constitution of the State provides: "The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial or traverse jury, except in the superior and city courts." (Constitution of Ga., Article VI, Sec. XVIII, Par. I, Code of Ga., 1933, Sec. 2-4501). The criminal court of Fulton county is not a city court. *Welborne vs. State*, 114 Ga. 793.

There is nothing in the Federal Constitution regulating the size of juries in the courts of the States. A State may adopt or reject trial by jury. *Walker vs. Sauvinet*, 92 U. S. 90, 23 L. ed. 678. It may provide for a jury of eight rather than twelve. *Maxwell vs. Dow*, 176 U. S. 581, 44 L .ed. 597. "Consistently with that (Fourteenth) Amendment, trial by jury may be abolished." *Snyder vs. Mass.*, 291 U. S. 97, 105. The Sixth Amendment to the Federal Constitution providing for jury trial does not apply to the States; it is exclusively a restriction upon Federal power. *Twitchell vs. Pa.*, 7 Wall. 321, 19 L. ed. 223; *Ex Parte Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. ct. Rep. 482; *Eilenbecker vs. District Court of Plymouth County*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *Wilburn vs. State*, 141 Ga. 510 (2b); *Loeb vs. Jennings*, 133 Ga. 796 (3); *Moore vs. State*, 151 Ga. p. 648 (1b); *Lewis vs. State Board*, 162 Ga. 263 (2), 265. The adoption of the Fourteenth Amendment did not have the effect of making the provisions of the Sixth Amendment operative in State Courts. *Maxwell vs. Dow*, 176 U. S. 581, 44 L. ed. 597.

It was therefore proper for the General Assembly to create the criminal court of Fulton county for the trial of misde meanors in that county and provide for a jury of five to be selected from a panel of twelve with four strikes to the accused and three to the State. That the superior court then had and now has under the Constitution of the State concurrent jurisdiction in the same county over misdemeanor cases, and that the jury in that court is one of twelve selected from a panel of twenty-four from which the accused may peremptorily strike seven, deprives no one of the equal protection of the laws. The State had power and authority to set up the two courts and regulate the procedure in each. The equality clause does not purport to strip the State of this inherent attribute of sovereignty. That the number of persons constituting juries and the strikes allowed the accused in the respective courts are

not uniform in but an incident to the free exercise by the State of this undoubted right and power. So long as persons tried for similar offences in the same court are allowed the same rights there is no denial of the equal protection of the laws. It is true the two courts with varying procedure have jurisdiction over the same territory. But this does not offend the Constitution. Territory *may* afford a reasonable and convenient means of classification, and classification *may* be made upon the basis of territory; but territory is not the only basis for classification. In *Brown vs. New Jersey*, 175 U. S. 172, 44 L. ed. 119, this court had under consideration an attack under the equality clause on a "struck jury" statute of New Jersey which permitted an accused only five peremptory challenges in a case where a struck jury had been ordered, while twenty challenges were allowed in a trial before an ordinary jury. The statute was sustained this court saying at 175 U. S. pp. 176-177:

> "It is said that the equal protection of the laws was denied because the defendant was not given the same number of peremptory challenges that he would have had in a trial before an ordinary jury. In the latter case he would have been entitled under the statute to twenty peremptory challenges, but when a struck jury is ordered, he is given only five. ***But that a State may make different arrangements for trials under different circumstances of even the same class of offenses has been already settled by this court.*** (italics by counsel) . . . . It is true that here there is no territorial distribution, but in all cases in which a struck jury is ordered the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury."

And at bar all persons tried for misdemeanors in the superior court are tried alike; and all persons tried in the criminal

court are tried alike.

Venue and new trial for newly discovered evidence. The criminal court Act gives that court no authority to order a change of venue. The superior court has the authority to order changes of venue in Georgia under Article VI, Sec. XVII, Par. I of the Constitution (Code of Ga. 1933, Sec. 2-4401): "The power to change the venue in civil and criminal cases shall be vested in the superior courts to be exercised in such manner as has been, or shall be, provided by law." The appellate courts of Georgia have never been called upon to determine whether the superior court has authority to order a change of venue as to a case pending in another court, but the superior court probably has such authority under this provision of the Constitution, particularly as it is a court of general jurisdiction. Assuming, however, that the superior court has no such authority and that an accused in the criminal court is powerless to move for change of venue, while another accused in the superior court may so move, no case of constitutional inequality is shown. All in the superior court have the same rights, as do all in the criminal court. The State had power to establish both courts and provide for their respective procedures, and these differences are but an incident to the exercise of that power. The Constitution of the State provides that the venue of criminal cases is in the county where the crime was committed. (Code of Ga. 1933, Sec. 2-4306). To move for a change of venue is not a vested right. "It is not a right similar to that of a trial by jury but a mere legal right to which a party is entitled under the terms and under the qualifications prescribed in, or reasonably deducible from, the law." *Cotton vs. State,* 32 Tex. 614. See *Dulany vs. State,* 45 Md. 99; *State vs. Dyer,* 139 Mo. 199, 40 S. W. 768. In some States no provision is made (or was made at the time of the decision cited) for change of venue in misdemeanor cases. See *Hanley vs. State,* 125 Wisc. 396, 104 N. W. 57;

Washington vs. State, 2 Okl. Cr. 428, 101 P. 863; *Henderson vs. State* (Tex.) 39 S. W. 116; *Fike vs. State,* 25 Oh. Cir. Ct. 554. In Georgia, since the creation of the criminal court 70 years ago, no case has ever reached the appellate courts where an accused in that court sought to obtain change of venue. In all the judicial history of the State only one defendant in a misdemeanor court has moved in that court for change of venue. *Slaughter vs. State,* 61 Ga. Appeals 619. Fulton county has a population approaching an half million, and there are eighteen thousand five hundred fifty names in the jury box available for service. Misdemeanors excite no such public attention as makes it at all likely that an impartial jury could not be obtained in any case in the criminal court from the thousands of jurors available.

The principles above referred to likewise refute the contention of inequality because a defendant in the criminal court cannot move for a new trial on the ground of newly discovered evidence. An appeal is not a matter of right. *Andrews vs. Swartz,* 156 U. S. 272, 39 L. ed. 422; *McKane vs. Durston,* 153 U. S. 684, 38 L. ed. 867. "Neither is the right of appeal essential to due process of law. In nearly every State are statutes giving in criminal cases of a minor nature, a single trial without any right of review. For nearly a century trials under the federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted." *Reetz vs. Michigan,* 188 U. S. 505, 508, 47 L. ed. 563. Petty crimes and misdemeanors are not committed under circumstances making investigations as to alleged newly discovered evidence after conviction fruitful of justice. No accused in the criminal court has the right to

appeal on grounds of newly-discovered evidence; there is no inequality; the statute creating the court provides all are to be tried alike.

Moreover, petitioner is not entitled to complain of the lack of provision for change of venue or the granting of new trial for new evidence, because he does not show that he was not tried by an impartial jury, nor does he set up any new evidence. He is not injured by the absence of the provisions of which he complains. "A court will not listen to an objection as to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." Cooley, Constitutional Limitations, 5th Ed. p. 197. "Only those whose rights would be prejudiced by the enforcement of an unconstitutional act will be heard to question its validity." 6 Am. & Eng. Enc. of Law (2nd Ed.) p. 1090. To the same effect, see *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 190; 81 L. ed. 1027, 1033, headnote 8; *Brown-Forman Company vs. Commonwealth*, 217 U. S. 563, 54 L. ed. 883; *Roberts & Schaefer Co. v. Emerson*, 271 U. S. 50, 54, 55, 70 L. ed. 827, 833; *Reid vs. Eatonton*, 80 Ga. 755, 757; *Plumb vs. Christie*, 103 Ga. 686; *Griffin vs. State*, 183 Ga. 775, 777; *Webb vs. Atlanta*, 186 Ga. 430 (5), 444.

"To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law an apprehension of what might be done under it, and which, if done, might not receive judicial approval." *Lehon vs. Atlanta*, 242 U. S. 53, 56, 61 L. ed. 145, 150. As was said in *Snyder vs. Massachusetts*, 291 U. S. 97, at 113: "The least a defendant must do, if he would annul the practice . . . which the commonwealth has approved by the judgment of its courts, is to show that in the particular case in which the practice is exposed to challenge, there is a reasonable possibility that injustice has been done."

No inequality because of differing modes of appeal. Appeal from the superior court is to the court of appeals or supreme court; from the criminal court it is by certiorari to the superior court, thence to the court of appeals or supreme court. What has been already said is sufficient to demonstrate that no violence is done the equality clause by the differing methods of appeal, and this is true, even though, as petitioner contends, the appeal from the criminal court is more tedious and expensive. All persons appealing from this court take the same route.

Nor is any other result obtained by viewing the differences in procedure in their entirety. On the contrary, the unsubstantial nature of the attack becomes more apparent. Certainly the State is not without authority to establish in its most populous county two courts, one a constitutional court of general jurisdiction over all classes of cases, civil and criminal; and the other, a misdemeanor court to handle charges of petty crimes. And certainly the State is not without authority to provide a procedure for each of these courts in harmony with their varying functions.

In *Bowman v. Lewis* (*Missouri v. Lewis*) 101 U. S. 22, 25 L. ed. 989, the Constitution and laws of Missouri so divided the jurisdiction of its courts that disbarment proceedings arising in St. Louis were not appealable to the supreme court of the State, while in other parts of the State such proceedings were appealable. This was held not to deprive one disbarred in St. Louis of the equal protection of the laws. Said the Court: "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State pre-

scribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." And likewise diversities may exist between different courts in the same part of a State, for, as the Fourteenth Amendment does not require uniformity throughout the Union, nor require uniformity within a State, by like token it does not require uniformity in any particular part of a State. As said by the Court: "It contemplates persons and classes of persons." And here we have persons and classes of persons; those tried in the criminal court by reason of accusations preferred against them therein or indictments transferred out of the superior court in the discretion of the presiding judge, and those tried in the superior court which that court in the exercise of a sound discretion deems proper to retain.

In *Lang vs. New Jersey*, 209 U. S. 467, 52 L. ed. 894, a statute of that State permitted objection to grand jurors on specified grounds by persons accused before the jury was impaneled, but did not permit such objection by persons accused afterward. This difference was held not to amount to any denial of the equal protection of the laws, the statute being designed to make the grand jury a more efficient instrument of justice, and not to benefit any particular defendant or class of defendants.

In *Graham vs. West Virginia*, 224 U. S. 616, 56 L. ed. 917, statutes of that State authorized the bringing of convicts in the penitentiary before the court of a specified county to be tried upon information alleging previous conviction, so that sentence might be imposed as against habitual criminals; while persons not in the penitentiary in order to be punished as habitual criminals had to be proceeded against by indict-

ment. In rejecting the claim that this was a denial of the equal protection of the laws, this court said in 224 U. S. at p. 630: "The Fourteenth Amendment is not to be construed *'as introducing a factitious equality, without regard to practical differences that are best met by corresponding differences of treatment.'* (italics by counsel) *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 420, 54 L. ed. 817, 820, 30 Sup. Ct. Rep. 543. A State may make different arrangements for trials under different circumstances of even the same class of offenses (cits.); and certainly it may suitably adopt to the exigency the method of determining whether a person found guilty of crime has previously been convicted of other offenses. All who were in like case with the plaintiff in error were subject to the same procedure."

The allowance of an appeal to the State from the court of one district, but not from another district, of the State in case of the grant of a new trial to an accused person, is not a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Mallett and Mehegan vs. North Carolina*, 181 U. S. 589, 45 L. ed. 1015.

In *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, sustaining statutes allowing the State, in capital cases, fifteen peremptory challenges in cities of over an hundred thousand inhabitants, instead of eight as in other parts of the State, the court quoted from *Barbier vs. Connolly*, 113 U. S. 27, 32, as follows: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the Amendment."

All persons within the sphere of the operation of the statutes in question are affected thereby. All persons charged with the commission of misdemeanors in Fulton county are

subject to trial in either the superior court or the criminal court. All persons accused in the criminal court by accusation or against whom indictments have been returned by the grand jury and transferred into the criminal court for trial, are tried alike. All persons tried in the superior court are tried alike. As was said by the supreme court of Georgia in *Welborne vs. Donaldson*, 115 Ga. 563, 566, sustaining the legality of the court against substantially the attack here made:

> "We are also of the opinion that there is no merit in the contention that the Act creating that court is, for the reason assigned, repugnant to the Fourteenth Amendment to the Constitution of the United States, which forbids State legislation denying to any person 'the equal protection of the laws.' All persons charged with the commission of misdemeanors in Fulton county are alike subject to trial in either the superior or the criminal court. No one accused of a misdemeanor in either of these courts has a right to demand a trial in the other. There is in this respect no discrimination in favor of some and against others. No person is given the advantage, if advantage it be, of having a right to demand a jury of twelve, while another is placed under the disadvantage, if such be the case, of having his guilt or innocence passed upon by a jury of five only. Every one must go to trial in the court in which he is arraigned, and the chances of all with regard to this matter are precisely the same."

"The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of State procedure. See *Missouri ex real. Hurvitz v. North*, 271 U. S. 40, 70 L. ed. 818, 46 Sup. Ct. Rep. 384.

In the exercise of that power and to satisfy a public need, a State may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard." *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U. S. 151, 158, 76 L. ed. 214, 219.

Transfer of indictment did not deny equal protection of laws

In support of his contention that, if the statutes creating the criminal court be constitutional, nevertheless it was a denial of the equal protection of the laws to transfer to that court for trial the indictment found against him in the superior court, petitioner sets up that the law directing such transfer in the discretion of the presiding judge of the superior court was not complied with, but that the transfer was "left to the capricious whim of the solicitor general who, under the law, has no right to select such court." (His brief, p. 13).

This contention as to whim or caprice, and as to transfer by the solicitor general, is not supported by the record. The record discloses indictment returned into the superior court (R. 20), judgment thereon in the criminal court (R. 21), and the allegation of the plea in abatement in that court is that the "case has now been transferred to the criminal court of Fulton county without petitioner's consent." (R. 3 at Par. 4). The State law (Ga. Laws, 1873, p. 119) provides for transfer ". . . . at the discretion of the presiding judge of said superior court . . . " Petitioner made no allegation in his plea of abatement that the transfer was other than by order of the presiding judge as required by law and in accordance with rule 10 (b) of the superior court, supra. No contention of illegal transfer was made before the supreme court of the

State or passed upon by that court. The presumption is that the law was complied with, and the burden is upon petitioner to show error. *Carroll v. Peake*, 1 Peters 18, 23, 7 L. ed. 34, 36; *Bagwell v. Broderick*, 13 Peters 436, L. ed. 235, 240. He must show it affirmatively by the record. *Richter v. Cann* (Ga.), 11 S. E. 2nd. 774, 775. "Where the record discloses that a case has been transferred to a city court under authority of a special enactment, it will be presumed, nothing to the contrary appearing, that the requirements of the Act authorizing the transfer have been complied with." *Lane v. Brinson*, 12 Ga. Apps. 760 (3). Petitioner therefore makes before this court no question as to whim or caprice or illegality of transfer.

The only question then, is, was it contrary to the equality clause for the presiding judge of the superior court to exercise his discretion in the matter of the transfer and to determine that the case should be transferred for trial. What has been said as to the legality of the statutes creating the court readily answers there was no denial of equal protection. All persons indicted by the grand jury whose indictments the court determines in its discretion should be transferred for trial, are tried in the criminal court and tried alike, just as in *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, all tried before a stuck jury ordered in the discretion of the court had the same rights. Petitioner received the same treatment as all others in his class. The classification is a perfectly reasonable one, arising from the exercise of the judgment of the court, and no semblance of arbitrary action is shown. A true picture of the situation in the county is shown by Fulton superior court rule 10 (a) as follows: "The grand jury has the right to investigate all charges of crime, misdemeanors as well as felonies; and when necessary it is its duty to do so. But provision has been made in this county for the trial of misdemeanor cases in a misdemeanor court at much less expense

to the county than would be possible in the superior court. Besides, all available time of the court for the trial of criminal cases is taken up with felony cases, necessitating assistance in that work from a judge of an adjoining circuit. Therefore, the solicitor general shall not encourage the grand jury to investigate misdemeanor cases unless some good reason exists which could not be afforded in the misdemeanor court." (Rule of Fulton Superior Court adopted June 27, 1936, p. 34).

Petitioner's contention "rests upon the assumption that such (Fourteenth) Amendment not only secures that the rights and obligations of persons shall be measured by equal laws, but also that the provisions of the Amendment control the States in the creation of courts and in the provisions made for the trial of causes in the courts which are created. This proposition, however, was long since decided to be untenable. *Missouri v. Lewis*, 101 U. S. 22; *Chappel Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474. In the first of these cases it was directly held that the Fourteenth Amendment did not operate to deprive the several States of the complete power to create such courts as were deemed essential, and to endow them with such jurisdiction as was considered appropriate. This being true, it follows, as the lesser is contained in the greater power, that the State law which authorized under enumerated circumstances and conditions the transfer of the cause from one count to another, was equally unaffected by the provisions of the Fourteenth Amendment." *Cincinnati Street Railway Company v. Snell*, 193 U. S. 30, 35, 36, 48 L. ed. 604, 607.

No violation of Federal Constitution to admit into evidence articles taken without search warrant

Petitioner states with respect to his contention that his rights under the United States Constitution were violated

by the admission into evidence on the trial of the articles taken from him and his automobile by officers of the State without a search warrant, as follows: "This assignment was not based on the Fourth and Fifth Amendments to the Constitution of the United States, nor was it based on the application of the due process clause of the Fourteenth Amendment to the Fourth and Fifth Amendments. Rather, it was based *solely on a violation of the Fourteenth Amendment to the Constitution of the United States by depriving petitioner of the rights and privileges guaranteed him by the Constitution of the State of Georgia and laws enacted in pursuance thereof.*" (His brief, p. 15). In other words, petitioner makes no claim under the Fourth or Fifth Amendments; he recoginzes that the State is not prohibited by the due process clause from receiving evidence against him obtained by unlawful search and seizure; but he contends that by the law of the State it was illegal to receive this evidence and that he is entitled under the Fourteenth Amendment to resort to the federal court for the enforcement of the State law. This position is incorrect because there is no law of the State requiring the rejection of the evidence.

There is no statute in Georgia saying that articles obtained by search without warrant shall not be received in evidence against an accused on his trial for a violation of the criminal laws. The Constitution provides for due process of law (Article I, Sec. I, Par. III, Ga. Code 1933, Sec. 2-103); protests against unreasonable searches and seizures (Article I, Sec. I, Par. XVI, Ga. Code 1933, Sec. 2-116); and self crimination (Article I, Sec. I, Par. VI, Ga. Code 1933, Sec. 2-106); but that these provisions do not prevent the reception of evidence taken from a defendant's person by State officers without a search warrant, if relevant to the issue of guilt, has been repeatedly held by the supreme court of the State. *Williams vs. State*, 100 Ga. 511; *Sanders vs. State*, 113 Ga. 267;

Jackson v. State, 118 Ga. 780; *Springer v. State,* 121 Ga. 155; *Duren v. Thomasville,* 125 Ga. 1; *Calhoun v. State,* 144 Ga. 679; *Hysler vs. State,* 148 Ga. 409; *Groce v. State,* 148 Ga. 520; *Johnson vs. State,* 152 Ga. 271 (2); *Kennemer v. State,* 154 Ga. 139; *Lester vs. State,* 155 Ga. 882 (4); *Jackson vs. State,* 156 Ga. 647 (2, 3); *Herndon v. State,* 178 Ga. 832 (3) 843. See *Dozier vs. State,* 107 Ga. 708; *Evans v. State,* 106 Ga. 519. The question has been fully considered in these opinions; and the law in Georgia is settled. The *Williams* case was decided after exhaustive study of the subject as is revealed by an elaborate opinion and the *Calhoun* case was on certified questions by the Court of Appeals. Requests to review the *Calhoun* case were denied in both the *Kennemer* and *Lester* cases; and in the *Jackson* case a motion to review the *Calhoun* and *Kennemer* cases was granted and the decisions therein adhered to.

The law of Georgia is well stated in *Calhoun v. State,* 144 Ga. 679, as follows: "On the trial of a criminal case, incriminatory evidence which was taken from the person of the accused by one who had illegally arrested him, and who discovered it by search of his person while he was under illegal arrest, if relevant, is not inadmissible as contravening the constitutional provision that 'No person shall be compelled to give testimony tending in any manner to criminate himself.' (a) The constitutional guaranty is not limited to the protection of a witness testifying in a case. (b) Evidence obtained by an illegal and unauthorized search of one's person is admissible against him, and does not violate this constitutional guaranty. (c) But if the accused be compelled to produce the incriminating evidence, the evidence will be rejected as being in the nature of an involuntary admission. 2. Articles taken from the person or premises of the accused, tending to establish his guilt of the offense of which he is charged, are admissible in evidence against him, notwithstanding the ar-

ticles were discovered by an unlawful search and seizure; and this rule of evidence is not violative of the constitutional prohibition of unreasonable searches and seizures." And at page 680: "As a general rule, courts will not concern themselves with the manner in which evidence is procured, if the evidence is otherwise admissible and of probative value. (cits.) Rules of evidence exist to elicit truth. Irrelevancies which can have no other purpose than to cloud the real issues, or to confuse the investigation in hand for the sake of a matter that is not a part of it, as a matter both of practical expediency and of obtaining the truth, have no place in a trial." (Page 681). "In *Evans v. State*, supra, testimony to the effect that the accused while not under legal arrest was compelled to put his hand in his pocket and surrender a pistol, thus disclosing that he was violating the law, was inadmissible on the trial of such person for the offense of carrying a concealed weapon on that occasion. The evidence was excluded, not on the ground that the pistol was discovered after the accused was illegally arrested, but because he produced under compulsion the evidence of his guilt, and such act was in the nature of an involuntary confession. After examining the holding in the *Evans* case, this court held that evidence that a witness searched the person of the accused and discovered a concealed pistol on his person is not inadmissible because the witness may not have had a legal right to make the search. *Springer v. State*, 121 Ga. 155. The criterion is, who furnished or produced the evidentiary fact connecting the defendant with the crime? The true rule has been well stated by the supreme court of Alabama, as follows: 'However unfair or illegal may be the methods by which evidence may be obtained in a criminal case, if relevant, it is admissible, if the accused is not compelled to do any act which criminates himself, or if a confession or admission is not extorted from him,

or drawn from him by appliance to his hopes and fears. *Shields v. State,* supra.' "

There is therefore no merit in petitioner's contention that the articles showing his guilt should have been rejected according to the laws of Georgia, for under these laws the evidence was admissible. If petitioner means to contend that the supreme court of the State has laid down the *wrong* law and has *improperly construed* the Constitution of the State, the result is the same. For such is not a federal question. Each State has the right to construe its own statutes and constitutional provisions. "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the State or with that of the United States. If conflict with the State Constitution is the sole ground of attack, the supreme court of the State is the final authority . . . " *Michigan Central Railroad v. Powers,* 201 U. S. 245, 290, 291, 50 L. ed. 744, 760. "It is sufficient to say in reference to this contention that the decision of the supreme court of the State . . . . sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution. *West River Bridge Co. v. Dix,* 47 U. S. 6 How. 507; *Bucher v. Cheshire R. Co.,* 125 U. S. 555; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232; *Lewis v. Monson,* 151 U. S. 545; *Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194; *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685." *Merchants & Manufacturers National Bank v. Commonwealth,* 167 U. S. 461, 462, 463, 42 L. ed. 236, 237. "But the conformity with the State Constitution of the proceedings . . . is a question for the determination of the State court, and its judgment is final." *Smith v. Jennings,* 206 U. S. 276, 278, 51 L. ed. 1061, 1063. "It is argued that the court of appeals exceeded its functions under the Constitution of the State, and in that way denied the plaintiff due process of law. We see no reason to think so, but with that question we have nothing to do." *Burt v. Smith,* 203 U. S.

129, 135, 51 L. ed. 121, 127. "It is argued that the State court misconstrued the statute, but we have nothing to do with that." *King v. West Virginia*, 216 U. S. 92, 101, 54 L. ed. 396, 401. See *French v. Taylor*, 199 U. S. 274, 50 L. ed. 189. "The State supreme court held that the trial court, in admitting the testimony, did not commit error. This, notwithstanding the Constitution of Missouri provided 'that no person shall be compelled to testify against himself in a criminal case.' Its ruling upon that proposition is not subject to review in this court." *Barrington v. Missouri*, 205 U. S. 483, 486, 51 L. ed. 890, 894. See *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 227. That the action of the trial court in admitting the evidence was not contrary to the Constitution of the State "is for this court foreclosed by the decision of the highest court of the State." *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. ed. 119, 120.

Petitioner's contention proceeds upon the ". . . . misconception . . . that the requirement of due process of law took up the special provisions of the State Constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the State court that the local provision had been compiled with. This is a mistake." *Rawlins v. Georgia*, 201 U. S. 638, 639, 50 L. ed. 899, 900.

To adopt the rule contended for by petitioner, that for a State court to misconstrue a law or constitutional provision of the State is a violation of the Fourteenth Amendment, would be to make national questions of all issues, and destroy our federal system.

Nor was it offensive to the Constitution for any other reason to admit the seized articles. The Fourth and Fifth Amendments, as petitioner concedes, apply solely to the national government, and in no way impair State action. *Smith v.*

Maryland, 59 U. S. 71, 15 L. ed. 269, 271, 272; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 447, 48 L. ed. 1065; *National Safe Deposit Co. v. Stead*, 232 U. S. 58, 71, 58 L. ed. 504, 511; *Twitchell v. Commonwealth*, 74 U. S. 321, 19 L. ed. 223; *Barrington v. Missouri*, 205 U. S. 483, 486. There remains the Fourteenth Amendment. Was it violated? This Amendment did not have the effect of making the provisions of the Fourth and Fifth operative on the States. *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597. This leaves, as the only restriction on State action relative to procedure in its court, the requirement of due process of law. "And if, as decided (by the supreme court of the State) the admission of this testimony did not violate the rights of the plaintiff in error under the Constitution and laws of the State . . . the record affords no basis for holding that he was not awarded due process of law." *Barrington v. Missouri*, 205 U. S. 483, 486, 487, 51 L. ed. 890, 894; because "This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken L. & L. Co.*, 18 How. 280. Due process of law is process according to the law of the land. This process in the State is regulated by the law of the State." *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678, 679. It is settled law "That by the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and

distributive justice. *Hurtado v. California,* 110 U. S. 516." *Leeper v. Texas,* 139 U. S. 462, 35 L. ed. 225, 227.

Although the courts of the United States decline to receive evidence obtained by officers of the United States through unlawful search and seizure, by reason of provisions of the Federal Constitution which they deem prohibitive of the admission in the courts of the United States of such evidence (*Weeks v. United States,* 232 U. S. 383, 58 L. ed. 652); this does not deny to the States the right to receive like evidence in their courts, for the United States courts, in declining to receive the evidence, do so on account of the Fourth and Fifth Amendments which restrain the general government alone and not the States. That the construction placed on these amendments by the federal courts differs from the construction placed on similar State constitutional provisions by the State courts is a mere incident to the right of the States to construe their own laws. The right of an accused tried in a federal court for a violation of the laws of the United States to invoke the limitations placed upon the United States by the Constitution is a right of national citizenship. But the rules of evidence formulated by the federal courts for themselves in connection with their construction of these limitations do not become privileges and immunities belonging to national citizenship; for the rule arising out of construction of the constitutional limitation could not be of greater dignity than the limitation itself, and the limitation is not binding upon the States and does not create any national privilege.

The citizen may possess rights against the national government in the sphere of national action without possessing a corresponding right against the State within the sphere of State action; for, ". . . there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics

or circumstances in the individual." (*Slaughter House Cases*, 16 Wall. 36, 74); and "The distinction between national and State citizenship and their respective privileges . . . has come to be firmly established." *Twining v. New Jersey*, 211 U. S. 78, 96, 53 L. ed. 97, 105. The great mass of rights "belong to the citizens of states, as such, and are under the sole care and protection of the State governments." *Twining v. New Jersey*, 211 U. S. at page 94.

Due process of law is a national right which may not be denied. While ordinarily, as already seen, due process is adhered to by compliance with State laws in regular course, nevertheless if such laws in themselves or their administration deny due process, it is not obtained by following them. Thus, a State may not resort to "compulsion by torture to extort a confession" and thereby "substitute trial by ordeal." *Brown vs. Mississippi*, 297 U. S. 278, 80 L. ed. 682; *Chambers v. Florida*, 308 U. S. 541, 84 L. ed. 419. However, the State ". . . is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (cits.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder v. Massachusetts*, 291 U. S. 97, 105. "The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life." Per Roberts, J. in *Snyder v. Massachusetts* at page 127. Due process does not require trial by jury (*Walker v. Sauvinett*, 92 U. S. 90,

supra); does not protect the right to bear arms (*Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615); does not require indictment by grand jury (*Hurtado v. California*, 110 U. S. 516; *Gaines v. Washington*, 277 U. S. 81, 86); consistently with it, the common law may be abolished (*Bowman v. Lewis*, 101 U. S. 22, 25 L. ed. 989); it does not prevent the State from applying for and obtaining another trial and thereafter subjecting the accused to death although a lesser penalty had been first imposed (*Palko v. Connecticut*, 302 U. S. 319, 82 L. ed. 288); it does not protect the right of assembly for peaceful purposes (*U. S. v. Cruikshank*, 92 U. S. 542, 551, 23 L. ed. 588, 591); it does not require that an accused be confronted with the witnesses against him (*West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965); nor does it prevent the State from withdrawing the privilege against self-incrimination and putting the accused on the stand as a witness against himself (*Twining v. New Jersey*, 211 U. S. 78; *Snyder v. Massachusetts*, 291 U. S. at 105).

In the light of these principles, has petitioner been denied due process?

It is important to observe exactly what the State has denied. Let us first note what the State has not denied. It has not denied the right against self-incrimination. Petitioner was not compelled to do any act which incriminated himself. He did not produce by compulsion or otherwise the articles which bespoke his guilt. They were taken from his person and automobile by others. The State has not sought to make legal search without a warrant. On the contrary her Constitution forbids such searches; the decisions of her courts condemn them as "unlawful, unwarranted, unreasonable and reprehensible" (*Williams v. State*, 100 Ga. 511); petitioner may sue for and recover damages of those committing the trespass upon his person (*Burrow v. Southern Railway Co.*, 139

Ga. 733; *Young v. Western & Atlantic Railroad,* 39 Ga. Apps. 761); and they may be prosecuted and convicted of the misdemeanor of assault and battery. (See *Ga. Code, Sec.* 26-1401; 26-1408; *Hunt v. State,* 49 Ga. Apps. 13; *Harris v. State,* 21 Ga. Apps. 792). What the State has done is to deny to petitioner the alleged right to object to relevant evidence on the ground that the evidence was illegally obtained. What the State has done is to say that on petitioner's trial the sole question was his guilt or innocence and that her courts would receive and consider all evidence reflecting thereon. What the State has done is to deny that "The criminal is to go free because the constable has blundered." *People v. Defore,* 242 N. Y. 13; 150 N. E. 585, 587. Has the State in so doing offended some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental?

At common law, evidence, if relevant, was admissible though the party offering it obtained it illegally in violation of express law for which he was subject to be punished. *Jordan v. Lewis* (1739), H. 13 *Geo.* 2 *B. R.,* 2 *Strange* 1122, 93 *English Reports Reprint* 1072, *Note at* 14 *East* 306 104 *English Reports Reprint* 618; *Legatt v. Tollervey,* (1811), 14 *East* 302, 104 *English Reports Reprint* 617. The same rule was observed in subsequent decisions. *Caddy v. Barlow,* 1 Man & Ryl. 275; *Robson v. Alexander,* 1 M. & P. 448.

Greenleaf on Evidence, Fourteenth Edition, Vol. I, p. 325, Sec. 254 *a* states the rule to be: "It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally* taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor

will it from an issue to determine that question." To the same effect are 1 Bishop, New Criminal Procedure, p. 148 and 4 Wigmore on Evidence (2nd Ed.) Secs. 2183, 2184.

The leading case upon the subject seems to be *Commonwealth v. Dana,* 2 Metcalf (43 Mass.) 329, 337, 338: "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question." In *Commonwealth v. Tibbetts,* 157 Mass. 519, 32 N. E. 910, the supreme judicial court said: "A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent." The law of these two cases has been followed in Massachusetts in many cases. *Commonwealth v. Tucker,* 189 Mass. 457, and citations.

That constitutional provisions against unreasonable search and seizure do not change this rule of evidence was shown in *Williams v. State,* 100 Ga. 511, at pp. 519, 520, the court saying: "As we understand it, the main, if not the sole purpose of our constitutional inhibitions against unreasonable searches and seizures was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the Constitution of the United States and of this

and other States merely sought to provide against any attempt, by legislation or otherwise, *to authorize, justify or declare lawful* any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffective any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition could ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the State, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the State, but for himself only; and therefore he alone, and not the State, should be held accountable for his acts."

In *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, this honorable court cited with approval the foregoing quotation from Greenleaf stating the rule, the Massachusetts cases of Commonwealth v. Dana, Commonwealth v. Tibbetts, and other cases from that jurisdiction to the same effect, the Williams case, 100 Ga. 511, as well as decisions in Alabama, New Hampshire, West Virginia, South Carolina, Illinois and Arkansas, following the rule.

The court of appeals of New York in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585, declining to depart from the rule above stated, said through Judge Cardozo at p. 588: "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences

would be. The pettiest pace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied."

"The accepted rule is that the admissibility of evidence is not affected by the illegality of the means through which the witnesses were enabled to obtain the evidence." *Silva v. State*, 6 Okla. Cr. 97, 98. "Briefly stated, the rule is: Evidence against one accused of crime is not inadmissible because it has been wrongly obtained." *Pringle v. State*, 108 Miss. 802, 806.

The courts of last resort in the following States have adhered to this rule: (1) Alabama, *Pope v. State*, 168 Ala. 33, 34 (9) (search of house without warrant); (2) Arkansas, *Woolem vs. State*, 179 Ark. 1119 at p. 1120 (following rule); (3) California, *People v. Le Doux*, 155 Cal. 535 (letters obtained by search of residence in violation of State Constitution); (4) Connecticut, *State v. Griswold*, 67 Conn. 290 (search of place of business without warrant); (5) Colorado, *Roberts v. People*, 78 Col. 555, 559 (recognizes rule); (6) Georgia (cases cited); (7) Illinois, *Gindrat v. People*, 138 Ill. 103 (unauthorized search of room of accused, rule recognized); (8) Kansas, *State v. Miller*, 63 Kan. 62 (evidence discovered and taken in unauthorized search of premises); (9) Louisiana, *State v. Alvarez*, 182 La. 908 (search of residence without warrant); (10) Maine, *State v. Bor-*

roughs, 72 Me. 479 (illegal and unauthorized search of defendant's shop); (11) Maryland, *Nolan v. State*, 157 Md. 332, 333, 339 (papers seized by illegal search of home); (12) Massachusetts (cases cited); (13) Michigan, *People v. Campbell*, 160 Mich. 108 (forged note obtained by search of defendant's desk without warrant); (14) Minnesota, *State v. Denner*, 159 Minn. 189 (search of premises without warrant); (15) Mississippi, *Pringle v. State*, 108 Miss. 802, supra; (16) Missouri, *State v. Pomeroy*, 130 Mo. 489 (lottery tickets taken from person and premises of accused without authority of law); (17) Nebraska, *Walker v. State*, 113 Nebr. 19 (3) (unauthorized search of defendant's person and seizure of his property without warrant); (18) New Hampshire, *State v. Flynn*, 36 N. E. 64 (illegal search of home); (19) New Jersey, *State v. Gillette*, 103 N. J. Law 523 (1), 524 (evidence procured from premises of defendant by unjustified search and seizure); (20) New Mexico, *State v. Dillon*, 34 N. M. 366 (unreasonable search of premises); (21) New York, *People v. Defore*, 242 N. Y. 13, 150 N. E. 585, supra, (unlawful trespass and search of defendant's room); (22) North Carolina, *State v. McGee*, 214 N. C. 184 (search of house without warrant); (23) North Dakota, *State v. Lacy*, 55 N. D. 83 (unlawful search of premises); (24) Ohio, *State v. Lindway*, 131 Ohio St. 166, 2 N. E. 2d 490, cert. den. 81 L. ed. 375 (illegal search of home); (25) Oklahoma, *Silva v. State*, 6 Okla. Cr. 97, supra, (recognizing rule); (26) Oregon, *State v. Wilkins*, 72 Or. 77 (letters taken from person of defendant); (27) South Carolina, *State v. Campbell*, 131 S. C. 357 (4), 371 (papers taken without authority from defendant's room; (28) South Dakota, *State v. Madison*, 23 S. D. 584, 591 (illegal search and dwelling house and seizure); (29) Texas, *Johnson v. State*, 76 S. W. 925 (recognizing rule); (30) Utah, *State v. Sirmay*, 40 Utah, 525, 536 (rule recognized at pp. 536, 537); (31) Vermont, *State v. Stacy*,

104 Vt. 379, 384 (36), 385 (37, 38, 39), 400, 401 (illegal search of room); (32) Virginia, *Hall v. Commonwealth,* 143 Va. 554, 564, 566 (search of person of accused); (33) Washington, *State v. Royce,* 38 Wash. 111, 116, 117, 118 (pawn ticket illegally taken from person of defendant); and (34) West Virginia, *State v. Sutter,* 71 W. Va. 371, 372, 373 (search of person).

There are numerous decisions in each of these States to the same effect, according to 16 C. J. sec. 110, pp. 570, 571; and 22 C. J. S. sec. 657 (b), pp. 1006, 1007.

The supreme court of Virginia states in 143 Va. at p. 565 that the following States not named above recognize and follow the rule, to-wit, Arizona, Florida, Idaho, Montana, Nevada and Wisconsin. Adding these States the total number of State courts agreeing with the supreme court of Georgia is thirty-nine.

It is submitted that when forty States of the American Union are in harmony upon a rule of law, that rule of law can not be said to offend any princple of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Particularly is this true when the rule is in conformity with the common law, has been frequently stated by recognized law writers, and approvingly dealt with by this court.

The accepted rule does not violate the due process clause of the federal Constitution. *Banks v. State,* 207 Ala. 179, 18 Ala. Apps. 376; *Commonwealth v. Donnelly,* 246 Mass. 507; *Martin v. State,* 148 Ga. 406; *Hysler v. State,* 148 Ga. 409; *Groce v. State,* 148 Ga. 520; *Griggs v. State,* 29 Ga. Apps. 212; *People v. Defore,* 242 N. Y. 13, cert. den. 270 U. S. 557. It will be noticed that in the *Defore* case applica-

tion for certiorari was made to the supreme court of the United States and denied. Certiorari was also denied in *Lindway v. Ohio*, 299 U. S. 506, 81 L. ed. 375, where the question was the admissibility of evidence obtained by search contrary to the Ohio Constitution.

Illegal seizure by non-federal officer does not invalidate evidence

This court does not, in federal trials, repel evidence obtained by unlawful search and seizure by any persons other than federal officers. *Weeks v. United States*, 232 U. S. 383, 398, 58 L. ed. 652, 658. "We do not question the right of the federal government to avail itself of evidence improperly seized by State officers operating entirely on their own account." *Byars v. U. S.*, 273 U. S. 28, 33, 71 L. ed. 524. The rule of exclusion is not applied by this court to evidence obtain by trespassers other than agents of the government. *Burdeau v. McDowell*, 256 U. S. 465, 65 L. ed. 1048. See, *Gambino v. U. S.*, 275 U. S. 310, 317, 72 L. ed. 293, 296.

This court declines to hear in federal trials evidence of guilt from officers of the federal government who obtained it unlawfully, upon the broad ground of policy which it deems imposed upon it by the Fourth and Fifth Amendments. The Georgia courts find no such policy in the laws of the State and deeming the establishment of policy to be a legislative function, decline to adopt a rule of evidence which protects only the guilty; remembering that "Protection to person and property is the paramount duty of government and should be impartial and complete." (Constitution of Ga. Article I, Sec.

I, Par. II), and that upon the State government alone largely rests the duty and responsibility of maintaining the peace and order of society.

Respectfully submitted,

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